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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-710

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST GRAYSON, Superintendent - **Petitioners**

versus

NEWBURG AREA COUNCIL, INC., SARAH WHITE, JOHNIE WRIGHT and SUZANNE POST - - - - - **Respondents**

AND

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY and BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY - - - **Petitioners**

versus

JOHN E. HAYCRAFT and HAZEL K. LANE - - - - - **Respondents**

L. J. HOLLENBACH, III, County Judge - **Intervenor**

(Other parties respondent on inside cover)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, Theresa Black, John Schmidt, Earl Alluisi, and American Federation of Teachers

Additional Respondents in Board of Education of Jefferson County and Board of Education of Louisville versus Haycraft:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, John Schmidt, Earl Alluisi, and Louisville and Jefferson County Federation of Teachers, Local 672, Newburg Area Council, Inc. and Kentucky Human Relations Commission.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Board of Education of Jefferson County, Kentucky, and its Superintendent, Ernest Grayson, respectfully pray that a writ of certiorari issue to review the decision rendered in this case on August 23, 1976, by the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The original Memorandum Opinions and Judgments in these consolidated desegregation actions of the District Court were reversed and remanded for further proceedings by the United States Court of Appeals for the Sixth Circuit in *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 489 F. 2d 925 (6th Cir. 1973). This Court granted this petitioner's request for a writ of certiorari from that decision and reversed and remanded in light of *Milliken* v. *Bradley*, 418 U. S. 717 (1974). *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 489 F. 2d 925 (6th Cir. 1973), *vacated* 418 U. S. 918 (1974).

On remand the Court of Appeals distinguished *Milliken* and reinstated its previous decision with modifications. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 510 F. 2d 1358 (6th Cir. 1974). This Court subsequently denied review of that decision of the Court of Appeals. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 510 F. 2d 1358 (6th Cir. 1974), *cert. den.*, 421 U. S. 931 (1975).

On July 17, 1975, the Court of Appeals issued a Writ of Mandamus to the District Court directing the full implementation of a plan of desegregation beginning with the school year 1975-76. *Newburg Area Council* v. *Gordon*, 521 F. 2d 578 (6th Cir. 1975).

The District Court issued its Desegregation Order pursuant to the Mandamus of the Court of Appeals on July 30, 1975. This Order is contained in part in the

separate Appendix to this petition. (Appendix, pp. 50-90). On August 2, 1976, the District Court amended its Desegregation Order to require, *inter alia*, the busing of an additional nine hundred black children each year in an attempt to bring twenty-eight elementary schools within the racial quotas set in the original Desegregation Order. The Amended Desegregation Order of August 2, 1976, is presently on appeal in the Court of Appeals by the petitioner here, the Board of Jefferson County, Ky. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky., appeal docketed*, No. 76-2301, 6th Cir., Sept. 30, 1976. This Amended Desegregation Order is contained in the separate Appendix to this petition (Appendix, pp. 94-108).

The Court of Appeals on appeal from the original Desegregation Order of the District Court of July 30, 1975 affirmed that Order. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, Nos. 75-2032, 75-2188, 76-1413, 76-1414, 6th Cir., Aug. 23, 1976. This unreported decision of the Court of Appeals is the one to which this petition for writ of certiorari is directed. It is contained in the separate Appendix to this petition (Appendix, pp. 109-123).

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 23, 1976. This petition for writ of certiorari was filed within ninety days of that Judgment. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT OF QUESTIONS PRESENTED

I. Did the District Court Abuse its Discretion in Rejecting a Plan of Desegregation in Which No School Would Have a Pupil Racial Composition of Less Than 10 Per Cent or More Than 50 Per Cent Black Pupils in a School System Whose Pupil Racial Composition is 20 Per Cent Black?

II. Where a Plan of Desegregation Imposed by a District Court Requires That 80 Per Cent of All Schools Operated by a School District With an Enrollment in Excess of One Hundred Thousand Pupils Maintain Pupil Racial Quota Which Deviate From the Pupil Racial Composition of the District by Only 5 Per Cent or Less, Does Such a Plan Impermissibly Raise Racial Balance to the Level of a Substantive Constitutional Right?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision relevant to the issues in this case is Amendment XIV, Sec. 1, United States Constitution:

> ". . . nor shall any such state . . . deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

These consolidated desegregation class actions, *Newburg Area Council, Inc.* v. *Board of Education of Jefferson County, Ky.*, No. 7045 (W.D. Ky.) and *Haycraft* v. *Board of Education of Louisville, Ky.*, No. 7291 (W.D. Ky.) were filed on August 27, 1971, and June 22, 1972, respectively. The District Court held separate trials on the question of whether or not the two school systems were unitary and on March 8, 1973, entered its Memorandum Opinion and Judgment in each case dismissing the Complaints filed therein. The District Court in dismissing these complaints noted that a fairly typical pattern of metropolitan racial isolation did in fact exist in the Louisville-Jefferson County Metropolitan Area. The District Court commended the defendant school systems for their early attempts to desegregate their schools after this Court's landmark decision in *Brown* v. *Board of Education Topeka I*, 347 U. S. 483 (1954). At the time of the original decision of the District Court, the defendant school systems, Board of Education of Jefferson County, Ky. and Board of Education of Louisville, Ky., operated separate and distinct school systems under the law of the Commonwealth of Kentucky. At such time, the County system which encompassed primarily the suburbs surrounding Louisville, Kentucky had a pupil racial composition of 4 per cent black pupils. The Urban City System was roughly contiguous with the corporate boundaries of the City of Louisville, Kentucky and had a pupil racial composition of approximately 48 per cent black. The vast majority of the black pupils in Jefferson County,

Kentucky were isolated by housing patterns in the northwest quadrant of Jefferson County, Kentucky.

The Court of Appeals consolidated these actions for the purposes of appeal by the original plaintiffs from the decisions of the District Court of March 8, 1973. On December 28, 1973, the Court of Appeals entered its original decision in this matter. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 489 F. 2d 925 (6th Cir. 1973). The Court of Appeals reversed the judgments of the District Court and remanded the case for the formulation of a desegregation plan.

> "By whatever means the district court deems appropriate in the exercise of its equity powers. . . . all vestiges of state-imposed segregation must be eliminated within each school district in the county. To accomplish such purpose, state-created school district lines shall impose no barrier. We do not require use of any particular method nor approve in advance the use of any particular device. Any plan of desegregation is to be effective for the 1974-75 academic year." *Newburg, supra,* 489 F. 2d 925, 932.

The Court of Appeals held with respect to the County School System that it could not have been fully converted to a unitary system after *Brown I* where 56 per cent of all its black elementary school students attended three of 74 elementary schools. A similar finding was made with respect to the Louisville City system where the Court found that 80 per cent of its schools were racially identifiable. *Newburg, supra,* 489 F. 925, 929-930.

On July 25, 1974, this Court granted petitions of certiorari filed by all three school districts involved at that time in the litigation and vacated the Court of Appeals decision of December 28, 1973 for reconsideration in light of the concurrent decision in *Milliken* v. *Bradley, supra, Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 489 F. 2d 925 (6th Cir. 1973), *vacated* 418 U.S. 918 (1974).

On remand, the Court of Appeals distinguished *Milliken* v. *Bradley, supra,* from the case at bar and reinstated its judgment of December 28, 1973 with minor modifications. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.*, 510 F. 2d 1358 (6th Cir. 1974). The Court of Appeals on remand determined *ab initio* that this Court's decision in *Milliken* in no respect required a reconsideration of the original determination of that Court that the City and County systems were impermissibly segregated as a matter of law. *Newburg, supra,* 510 F. 2d 1358, 1359. The Court of Appeals also directed certain procedural requirements with respect to reconsideration and implementation by the District Court. *Newburg, supra,* 510 F. 2d 1358, 1361.

On January 30, 1975, the District Court directed the City and County school systems to exercise their affirmative duty to come forward with a constitutionally acceptable desegregation plan. On March 31, 1975, the District Court entered its order maintaining separately, for the purposes of this litigation only, the legal entities of the Board of Education of Jefferson County, Ky. and the Board of Education of Louisville,

Ky., as constituted on such date, even though on April 1, 1975 the Board of Education of Louisville, Ky. lost its legal identity through merger with the parent school system, Board of Education of Jefferson County, Ky. The District Court's order of March 31, 1975 (Appendix, pp. 1-3) directed the sequential filing of desegregation plans by the former school systems beginning April 30, 1975.

The Board of Education of Jefferson County, Ky. on April 30, 1975 filed a proposed plan of desegregation known as the JET Plan (an acronym for Jefferson Educational Trip) pursuant to the District Court's order of January 30, 1975 directing the filing of such plan. The Board of Education of Louisville, Ky. filed its own plan of desegregation, "Revised Plan X," on May 20, 1975. After a full pre-trial conference on June 19, 1975, counsel for plaintiffs filed a Petition for Writ of Mandamus in the Court of Appeals in an attempt to compel the District Court to implement the pupil assignment aspects of a desegregation plan for the 1975-76 school year. On July 17, 1975, the Court of Appeals issued a Writ of Mandamus compelling the District Court to order the implementation of a plan of desegregation for the 1975-76 school year. *Newbury Area Council* v. *Gordon, supra.*

On the same day the mandamus was issued to the District Court, the Board of Education of Jefferson County, Ky. discussed with the District Court and the parties a supplement to the JET Plan which it proposed to file eliminating the "part time" aspect of such plan. The District Court, however, rejected both the

JET Plan, as so supplemented, and the Louisville System's Revised Plan X at such time. The Supplement to the JET Plan was not actually filed in the District Court until July 30, 1975. Both the JET Plan and the Supplement are contained in the separate Appendix to this petition. (Appendix, pp. 4-43; 43-50)

The JET Plan relied primarily on two tools to effect the transition to a unitary school system. The first such tool was to substantially redistrict the former Louisville School System which in many instances did not previously have individual school attendance zones due to a widespread use of a voluntary transfer plan which had been in effect in that school system for some time. Whenever possible individual school attendance zones were drawn so as to effect the maximum amount of desegregation of the student body for each school. The second method used by the JET Plan for desegregation of the two school systems was the clustering of several formerly predominantly white schools with a formerly predominantly black school with subsequent reassignment of many of the pupils in the cluster. Utilizing these two tools the JET Plan was designed to insure that no school in the school system would have a student racial composition of less than 10 per cent nor more than 50 per cent black pupils. The implementation of this plan would have involved the busing of in the neighborhood of 12 to 14 thousand pupils.

In light of the almost impossible task of preparing and implementing a plan of desegregation for a school system of in excess of 110,000 students in less than 60 days precipitated by the Mandamus of the Court of

Appeals directed to the District Court the parties at the request of the District Court and specifically in light of his rejection of both the JET Plan, as supplemented, and Revised Plan X, entered into an "Advice to the Court," waiving their right to a hearing on the propriety of the two desegregation plans tendered by the defendant school systems. (Appendix, pp. 90-91) In light of the fact that the District Court never held an evidentiary hearing on the proposed plans of desegregation submitted by the defendant school systems, this Court has no record to aid it in determining the propriety of the desegregation order ultimately adopted by the District Court. Certain actions by the District Court after the adoption of its original desegregation order of July 30, 1975, such as the District Court's amended Desegregation Order of August 2, 1976 (Appendix, pp. 94-108), while involving separate issues not directly in question here, do shed considerable light on the question of the propriety of the original desegregation order itself.

The original desegregation order of the District Court of July 30, 1975, is contained in substantial part in the separate Appendix to this petition. (Appendix, pp. 50-90) As in the JET Plan, the District Court's desegregation plan of July 30, 1975, relies on two primary tools for desegregation of the Jefferson County School System. The District Court adopted without any substantial revision the redrawn individual school attendance zones proposed in the JET Plan. Where the two plans diverge however is in the required degree of

racial balance in the individual schools within the system.

The District Court's desegregation plan of July 30, 1975 ostensibly sets as "guidelines" racial compositions of from 12 to 40 per cent black in the elementary schools and 12½ to 35 per cent black in the middle schools and high schools. The JET Plan increases this range from 10 per cent black to 50 per cent black. While the District Court's desegregation plan of July 30, 1975 denominates the two specific ranges of acceptable racial ratios mentioned hereinabove, in actual practice it sets specific racial compositions for every school in the school system. The picture resulting from a review of the actual racial quota set for each school by the District Court's plan of July 30, 1975 reveals that fully 60 per cent of the schools in grade groupings to which the Court directed its attention vary from the racial composition of the school system (20 per cent black) by three per cent or less and 80 per cent of that group vary from the "norm" by five per cent or less. For the convenience of the Court, a table has been appended to this petition which reveals the racial ratios in the individual schools set by the District Court's desegregation order of July 30, 1975 by percentages.

The tabular material found in the Addendum at the end of this petition compiles for the convenience of the Court information found at two separate points in the District Court's desegregation order of July 30, 1975. The table lists all schools (or separate portions of schools when such schools are so treated by the Desegregation Order of July 30, 1975) by the pupil racial com-

position specifically required for each such school or grade grouping by the District Court's desegregation plan. Schools exempted by such Plan from its transportation reassignment provisions are noted by an asterisk (*). Due to a lack of a uniform graded structure within the newly merged system (which has been partially rectified as of this writing) many schools have had imposed by the desegregation plan of July 30, 1975 different racial ratios for grades within a single building.

There are 171 schools or grade groupings which the desegregation plan requires to have specific pupil racial compositions. The Desegregation Plan as amended, to date, makes minor changes which are not significant to the issues presently before this Court. Even a cursory review of the table contained in the Addendum to this petition reveals the frequency with which the District Court utilized specific racial quotas which can only gratuitously be denominated as flexible. In light of the fact that the school system's racial composition is approximately 20 per cent black, several definitive trends emerge from an examination of the frequency with which the District Court utilizes certain specific racial quotas.

Only 4.7 per cent or 9 of the 171 schools and grade groupings denominated by the District Court allow a deviation from the "norm" by more than 10 percentage points. Four of the nine schools in this group are exempted from the transportation reassignment provisions of the District Court's desegregation plan of July 30, 1975. Nearly 78 per cent of the schools or

grade groupings denominated by the District Court's desegregation order of July 30, 1975 vary from the pupil racial composition of the school district by five percentage points or less. 67 Per cent of such number vary by four or less percentage points and 58 per cent vary by three or less percentage points. Exempted schools and grade groupings account for approximately one-half of the schools or grade groupings found in the upper five percentile points and lower three percentile points within the range specifically established by the District Court's desegregation plan of July 30, 1975. Even this mild concession to flexibility, however, does not make any allowance for times and distances of busing pupils. The phenomenon of the exempted school is based almost entirely on the incidences of integrated housing patterns in the Louisville-Jefferson County Metropolitan Area. It is significant that the number of exempted schools under the JET Plan is significantly greater than those established by the District Court's desegregation plan of July 30, 1975 due to the wider range of acceptable racial compositions incorporated in the JET Plan.

The Court can immediately discern from the table of racial ratios in the Addendum to this petition that the District Court utilizes the racial percentages from 15 per cent through 20 per cent almost exclusively for schools which are not exempted under the desegregation order of July 30, 1975 and are consequently involved in the transportation reassignment provisions of such plan. The extremely high frequency of the utilization of these percentages however does not stem directly

from the fact that the pupil racial composition of the entire school system is approximately 20 per cent black pupils. The extremely high frequency results instead from the specific pupil assignment methodology utilized by the District Court. This pupil assignment methodology sought to establish a uniform frequency of desegregation reassignment for pupils of a given race and anticipated that white children would be bused either once in five years or once in six years. Similarly black children would be required to be bused four out of every five school years or five of every six school years. The application of these overriding considerations specifically determine the relative frequency of 16 per cent (plus or minus one per cent) and 20 per cent (plus or minus one per cent) as the necessary racial quotas in the schools affected by the transportation reassignment or busing provisions of the District Court's desegregation order of July 30, 1975.

Indeed the only reason for any deviation from the 16 per cent and 20 per cent figures is simply a reflection of the minor degree of desegregation in the housing patterns in the clustered schools. It is readily apparent from a review of the geographic implications of the demographic picture in the Louisville Metropolitan Area that the time and distance involved in the desegregation bus runs of the clustered schools under the District Court's desegregation order of July 30, 1975 makes no significant statistical impact whatsoever on the racial quotas fixed for the individual schools in the system by such desegregation plan. At the very least, it is readily apparent that the required pupil racial

compositions under the District's Court's plan for the vast majority of schools and grade groupings denominated by such plan has little or no relationship whatsoever to the pupil racial composition of the individual school attendance zones.

The undisputed fact concerning the student reassignment methodology adopted by the District Court and incorporated in its desegregation plan is that *every* individual school operated by the school system has a required racial composition of a *substantially white majority* which in every case except nine exceeds 70 per cent, despite the fact that the residential population in the individual school zones has no meaningful relationship to the racial composition of the student body for such school created by the District Court's desegregation plan of July 30, 1975.

On September 4, 1975, the defendant school system began implementation of the plan of desegregation ordered by the District Court on July 30, 1975. Such plan and its implementation required the additional transportation of approximately 23,000 students over and above the extensive transportation already required under State law.

The Board of Education of Jefferson County, Ky. immediately began the process of appeal from the District Court's desegregation order of July 30, 1975. Indeed on July 28, 1975, the Board adopted a resolution authorizing counsel for the petitioner here to proceed with the necessary appellate steps. (Appendix, pp. 91-93) Motions for stay of the District Court's desegregation order of July 30, 1975 were summarily denied both

by the Court of Appeals and Justices Blackmun and Powell of this Court. (Appendix, pp. 124-126; 127)

The District Court retained jurisdiction over this matter to monitor the implementation of its desegregation plan of July 30, 1975. In this capacity, the District Court held hearings in early May, 1976 designed to review the implementation of its desegregation plan during the school year 1975-76 and review the need for amendments to its desegregation order of July 30, 1975. The eventual order of the District Court resulting from such hearings was entered on August 2, 1976 and an appeal concerning same is presently being prosecuted by the petitioner here in the Sixth Circuit. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky., appeal docketed,* No. 76-2301, *supra.* It is not the purpose of the petitioners to prematurely argue the merits of the District Court's amended desegregation order of August 2, 1976. The amendments ordered by the District Court, however, are significant to the issues presently before this Court to the extent that they reveal the actual intent of the District Court in regard to certain provisions of its desegregation order of July 30, 1975.

Briefly, the District Court found in May, 1976 that 28 of the elementary schools operated by the school system were not within the racial quotas set for elementary schools by the District Court's original desegregation order of July 30, 1975. However, the District Court found no disparity in the racial compositions of the middle schools and high schools operated by the defendant school system. The District Court summar-

ily determined that the "imbalances" found in the 28 elementary schools in question were impermissible per se. Consequently the District Court on May 6, 1976 entered an order appointing a special committee to draft an amendment to the original desegregation order of July 30, 1975 which would bring the errant elementary schools back within the racial quotas set by the District Court's original desegregation order. The District Court's special committee performed its duty as charged and submitted a plan designed to accomplish this result to the District court on June 17, 1976. The proposed requirement of busing an additional 900 black children per year was not accepted blindly by the black community which requested and obtained a hearing on July 2, 1976. The District Court nevertheless adopted the recommendation of its special committee in its amended desegregation order of August 2, 1976.

On August 23, 1976, the Court of Appeals affirmed the District Court's original desegregation order of July 30, 1975. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky.,* No. 75-2032, 75-2188, 76-1413, 76-1414, *supra.* It is the decision of the Court of Appeals which the petitioner seeks to review by writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

I. The Rejection By the District Court of the Constitutionally Sufficient Desegregation Plan of the Petitioner School System Disregards the Decisions of This Court.

The two specific reasons for granting the requested writ of certiorari directed to the United States Court of Appeals for the Sixth Circuit's judgment of August 23, 1976 are very closely inter-related. Indeed it is very difficult to understand the District Court's motivation for the rejection of the constitutionally sufficient plan of desegregation offered by the petitioner school system denominated as the JET Plan. The rationale of the District Court in this regard can only be fully explained in light of the presumption contained in the plan of desegregation ultimately adopted by the District Court. In both the rejection of the constitutionally sufficient JET Plan and the specific adoption of the racial quotas adopted in the desegregation plan of July 30, 1975, the District Court misconstrued the original decision of the Court of Appeals in this matter as requiring a semblance of racial balance in each individual school operated by the school system.

It is easy to understand the confusion of the District Court in this regard in the light of the Court of Appeals opinion of August 23, 1976. Such confusion however is not excusable in light of the clear language of *this* Court's leading decision concerning the proper considerations for the formulation of a desegregation plan, *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1974).

The analysis of the Court of Appeal in its original determination that the defendant school systems were impermissibly racially segregated (*Newburg, supra,* 489 F. 2d 925) undoubtedly convinced the District Court that the appropriate constitutional standard in formulating a desegregation plan for the defendant school systems compelled the degree of racial balancing revealed in the District Court's desegregation order of July 30, 1975.

Faced with the fact that the defendant school systems had almost immediately after the decision in *Brown I* begun extensive attempts at voluntary desegregation, the Court of Appeals had to abandon the normal criteria for determining the existence of impermissible state action resulting in segregated schools. The law of Kentucky prior to 1954, compelled the segregation of the races in public schools in the Commonwealth. The defendant school systems were, however, perhaps the first school systems in the country to voluntarily attempt to desegregate. As a result of this difficult factual situation, the Court of Appeals determined that a sufficient showing of unconstitutional state action stems solely from the fact that many of the schools operated by the defendant school systems were racially monolithic, thus implying the necessary state action component as a condition precedent to the imposition of the desegregation remedy. In making this conceptual leap the Court of Appeals chose to completely ignore the positive factual finding of the District Judge that demographic patterns were the substantial cause of the racially monolithic character of many of

the schools operated by the defendant school systems. Clearly, the analysis of the Court of Appeals, in its original decision of December 28, 1973, turned entirely on whether or not a specific school was "racially identifiable". The District Court, in following the standard laid down by the Court of Appeals, erroneously determined that such a standard required in the Jefferson County system a desegregation remedy which insured that no school, in the school system, regardless of the demographic situation of the neighborhood, contain a school with a substantial minority of black pupils.

In this Court's landmark decision in the *Swann* case, Chief Justice Burger, in apparent anticipation of the difficulties encountered by the district courts in the formulation of desegregation remedies, thoroughly discussed the precise nature of the exercise of the remedial discretion of the Federal Courts in the desegregation area of civil rights litigation. "The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts." *Swann, supra,* 402 U. S. 1, 15.

Swann properly places the basic responsibility for the formulation of a constitutionally sufficient desegregation remedy given a finding of impermissible segregative activity upon the school system. Chief Justice Burger quotes extensively from *Brown* v. *Board of Education of Topeka II,* 349 U. S. 249 (1955) to underscore this basic principle.

> "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. *Brown II, supra,* 349 U. S. 249, 299."

This Court expanded upon this basic principle of *Brown II in Green* v. *County School Board,* 391 U. S. 430 (1968).

> "The burden on a school board today is to come forward with a plan that promises realistically to work *now* . . . until it is clear that state imposed desegregation has been completely removed. *Green, supra,* 391 U. S. 430, 439."

In *Green,* this Court further held that school authorities are "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch". 391 U. S. at 437-438.

Chief Justice Burger expanded upon the rationale of *Brown II* and *Green* by the specific recognition that the necessity for the fashioning of a judicial remedy does not necessarily invest the district courts with the power to formulate such a remedy in a vacuum. "Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters *only* when local authority defaults." *Swann, supra,* 402 U. S. 1, 16 (Emphasis added).

It is clear from *Swann* that a district court can only proceed to fashion a desegregation remedy if and when

school authorities fail to come forward with a constitutionally sufficient plan of desegregation which reasonably promises to remedy the constitutional violation previously determined in the immediate future. *Swann, supra,* 402 U. S. 1, 15.

This Court's decision in *Swann* definitively enumerates that the primary consideration for a court of equity which is faced with the formulation of a desegregation remedy.

> "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II.*" *Swann,* 402 U. S. 1, 16.

The primary duty with which a district court is charged in fashioning a desegregation remedy is to design a remedy comensurate with the degree of the particular constitutional violation involved and at the same time eliminate the violation. "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann,* 402 U. S. 1, 16.

> ". . . (A) School desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interest, the condition that offends the constitution . . .

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." *Swann,* 402 U. S. 1, 15-16.

In analyzing the JET Plan submitted by the petitioner school system in compliance with the order of the District Court of January 30, 1975, and in accordance with its affirmative duty to come forward with a plan which promises to eliminate the constitutional violation found by the Court of Appeals, the District Court was faced with the application of two potentially conflicting standards. Clearly the scope of a remedy *compelled* by the nature of the violation found to exist by the Court of Appeals would be appropriately considerably narrower than the scope of a plan of desegregation which the petitioner school system might wish to *voluntarily* adopt and implement in the exercise of its plenary powers under state law. Indeed the plan of desegregation submitted to the District Court by the Board of the former Louisville District calls for considerably more recial balance than even the plan of desegregation adopted by the District Court on July 30, 1975.

In *Swann,* this Court held that the remedy *compelled* by the finding of unconstitutional segregation

by a school system was merely to eliminate the dual aspects of the school system.

> "We are concerned in these cases with the elimination of the *discrimination* inherent in dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. . . . It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination. . . .
>
> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportional racial concentrations in some schools." *Swann*, 402 U. S. 1, 22-23. (Emphasis added.)

Utilizing these principles for the formulation and review of constitutionally required remedies in this desegregation area, it is apparent that the District Court abused its discretion in rejecting the plan of desegregation tendered by the petitioner school system, the JET Plan. Significantly, even though racial isolation with respect to housing patterns in Jefferson County, Kentucky unfortunately reflects to a substantial degree the racial isolation which is typical in large metropolitan areas throughout the country, the

JET Plan calls for a racial composition in *every* school within the system of at least 10 per cent plack pupils. Conversely, no school in the system would have a racial composition in excess of 50 per cent black pupils. When this range of ultimate racial composition is reviewed in light of the racial composition of the entire school system of 80 per cent white, 20 per cent black, it is obvious that the remedy proposed by the petitioner school system is not only constitutionally sufficient, but may well exceed the requirements of this Court's decision in *Swann,* and thus to a degree reflect the educational policy of the Board of Education of Jefferson County, Kentucky.

In *Swann,* the District Court had patiently requested that the defendant school system come forth with an acceptable plan of its own on at least three occasions. In the matter at bar, the petitioner school system promptly complied with the order of the District Court of January 30, 1975 and in tendering the JET Plan, as supplemented, presented the District Court with an extensive plan specifically designed to remedy the constitutional violation found by the Court of Appeals. The proper standard for review of the JET Plan submitted by the petitioner school system under the guidelines enunciated in *Green* was, simply stated, whether or not the plan could be reasonably expected to work. ". . . [A] School authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness." *Swann,* 402 U. S. 1, 25. The data base on which the JET Plan operates is essentially the exact same data base ultimately used by

the District Court in the formulation of its desegregation plan of July 30, 1975. The District Court adopted almost without change the redesigned individual school attendance zones proposed by the JET Plan. The only substantial difference between the JET Plan, with its procedural emphasis on the importance of the neighborhood school, and the plan of desegregation adopted by the District Court of July 30, 1975 is the *degree* of racial balance compelled by the District Court's order. In promulgating a true range of acceptable racial ratios (10 per cent black to 50 per cent black) rather than concentrating on three or four racial ratios (16 per cent, plus or minus one per cent; 20 per cent plus or minus one per cent) the JET Plan not only complies with the standard of constitutional sufficiency, but also requires the busing of eight to ten thousand pupils less than the plan of desegregation adopted by the District Court on July 30, 1975.

It should be noted that the JET Plan did not contemplate the existence of any one race or virtually one-race schools in the school system, in spite of this Court's acceptance of such a circumstance given an appropriate factual situation reflecting significant racial isolation with respect to housing patterns.

> "In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation . . .

> (I)t should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law." *Swann,* 402 U. S. 1, 26-27.

The racial isolation of the northwestern quadrant of Jefferson County, Kentucky is well documented in the exhibits to the various plans filed in the District Court. It is no coincidence that the schools serving that geographic area have been for a number of years all black or virtually all black in pupil racial composition in spite of the voluntary free-transfer plan implemented by the former Board of Education of Louisville, Kentucky.

In a factual situation almost identical with respect to the general demographic situation to that in this case, this Court denied certiorari from the decision of the Court of Appeals affirming a plan of resegregation for the Memphis School System which contemplated the continued existence of numerous one-race schools. *Northcross* v. *Board of Education of Memphis City Schools,* 489 F. 2d 15 (6th Cir. 1973), *cert den.,* 416 U. S. 962 (1974). While the racial composition of the Memphis schools reflects a significantly higher proportion of black pupils in the student body of the entire system, the recial isolation of the black community in Memphis is not significantly greater in most instances than the racial isolation of the substantial portion of the black community in Jefferson County, Kentucky. Certainly the geographic distances involved in the length of bus rides required to effect any substantial

degree of desegregation is not significantly proportionally greater in the Memphis situation than it is in the case at bar. Indeed at the present time under the desegregation order of the District Court of July 30, 1975 a number of pupils are required to ride on school buses from their homes to their schools for in excess of an hour. This involves first riding a bus to their home school which in some cases involves a 45 minute bus ride and then boarding another but for an additional ride of 20 to 30 minutes to get to their ultimate school attendance. This double-busing is required by the considerable strain placed on the physical facilities of the school system by the busing of the 23,000 additional pupils required under the District Court's desegregation order of July 30, 1975.

In light of the demographic realities of the situation in Jefferson County, Kentucky, a plan of desegregation which contemplated the existence of five to 10 all black or virtually all black schools with a general range of racial compositions essentially similar in all other respects to that contemplated in the JET Plan for the remaining schools operated by the system would indeed be constitutionally sufficient. In light of that situation, it is difficult to comprehend the District Court's rejection of the JET Plan which scrupulously avoids the phenomenon of the one-race or virtually one-race school. The District Court has impermissibly required in rejecting the JET Plan a degree of racial balance specifically rejected by this Court in *Swann*.

II. A Plan of Desegregation Which Sets Racial Quotas for 80 Per Cent of the Individual Schools in a System Within 5 Per Cent or Less of the Racial Composition of the System Is Impermissibly Inflexible and Raises Racial Balance to the Level of a Substantive Constitutional Right in Violation of the Decisions of This Court.

The action of the District Court in rejecting the constitutionally sufficient plan of desegregation tendered by the petitioner school system is not the only compelling reason that this Court should direct a writ of certiorari to the Court of Appeals to correct the misapplication of the leading decisions of this Court (particularly *Swann*) by the District Court and the Court of Appeals. An analysis of the plan of desegregation adopted by the District Court on July 30, 1975 reveals that this plan raises a particular degree of racial balance to the level of a substantive constitutional right in specific violation of this Court's admonition in *Swann*.

In *Swann*, the defendant school board raised, *inter alia*, the issue set forth in this petition that the District Court over-relied on the use of predetermined racial ratios in formulating its remedy. This Court responded:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of

the school system as a whole. *Swann,* 402 U.S. 1, 24. See also *Winston-Salem/Forsyth County Board of Education* v. *Scott,* 402 U.S. 1221, 1227-29 (1971).

In the recent decision of this Court in *Pasadena City Board of Education* v. *Spangler,* —— U.S. ——, 96 S. Ct. 2697 (1976), this Court again dealt with issues essentially similar to those presently before the Court in this petition. In *Pasadena,* the District Court in 1970 had entered a desegregation order requiring that there be no majority of any minority in any Pasadena school. The propriety of that decree was not before this Court in *Pasadena* as no appeal was taken from *that* desegregation order. In discussing the implications of this provision with respect to the actions of the District Court in the post-implementation period, Mr. Justice Renquist reaffirmed this Court's condemnation in *Swann* of the enforcement of a particular degree of racial balance as a substantive constitutional right.

> Even had the district court's decree been unambiguous and clearly understood by the parties to mean what that court declared it to mean in 1974, the "no majority of any minority" provision would, as we have indicated previously be contrary to the intervening decision of this Court in *Swann, supra. Pasadena, supra,* 96 S. Ct. 2697, 2705.

The District Court's desegregation plan for the Pasadena Unified School District was identical to the plan of desegregation adopted by the District Court here on July 30, 1975, both in its requirement of a particular degree of racial balance, and in its requirement of the indefinite perpetuation of that degree of racial balance regardless of the precipitating cause of any deviance in the individual schools from such required racial quotas.

> The District Court's interpretation of the order appears to contemplate the "substantive constitutional right (to a) particular degree of racial balance or mixing" which the Court in *Swann* expressly disapproved. . . . It became apparent, at least by the time of the 1974 hearing, that the District Court viewed this portion of its order not merely as a "starting point in the process of shaping a remedy," which *Swann* indicated would be inappropriate; . . . but instead as an "inflexible requirement," . . . to be applied anew each year to the school population within the attendance zone of each school. *Pasadena,* —— U. S. ——, 96 S. Ct. 2697, 2703-04 (Citations omitted)

The plan of desegregation ordered by the District Court in this litigation requires a particular degree of racial balance in each school operated by the petitioner school system in two regards. First, while ostensibly denominating a range of acceptable pupil compositions (12 to 40 per cent black for elementary schools and 12½ to 35 per cent black for middle schools and high schools), the District Court only effectuates the full ramifications of that range to a small degree by its specific approval of the exemption from the transportation reassignment provisions of the plan of a handful of schools. As previously demonstrated, the District

Court specifically required that 80 per cent of all schools and grade groupings denominated by its desegregation plan reflect a specific racial quota within plus or minus five per cent of the racial composition of the student body of the school system as a whole. Further, as the District Court relied primarily on a specific racial ratio of 16 per cent plus or minus one per cent and 20 per cent plus or minus one per cent in order to effect the arbitrarily determined number of years each child would directly be involved in the transportation reassignment provisions of the desegregation plan of July 30, 1975. These latter provisions clearly deny that degree of flexibility which this Court has required in the fashioning of desegregation plans. *Swann,* 402 U.S. 1, 15.

The plan of desegregation approved by the District Court on July 30, 1975, specifically provides for the perpetual reallignment of the student racial compositions in the individual schools operated by the system to account for annual changes in the demographic pattern of Jefferson County, Kentucky.

> "As set out hereinafter, if any individual school ratio or population changes in a material fashion, appropriate steps will be taken to include that individual school and its students in the general transportation plan." (Appendix, pp. 55-56)

As indicated hereinabove, the District Court found it necessary to amend its desegregation plan to perpetuate the "integrity" of the racial quotas contained therein on August 2, 1976 due to non-participation in

the Court's plan by white pupils (white flight). This specific issue is presently before the Court of Appeals on appeal by the petitioner school system. *Newburg Area Council* v. *Board of Education of Jefferson County, Ky., appeal docketed,* No. 76-2301, 6th Cir., Sept. 30, 1976. While the merits of such a step are not before this Court directly in this petition, here, as in *Pasadena,* such a provision for perpetual reallignment of the plan to insure the integrity of the racial quotas denominated in the plan is a clear and unmistakable indication of the inherent and impermissible inflexibility of the plan and its elevation of racial balance to the level of a substantive constitutional right contrary to the express language of Chief Justice Burger in *Swann,* 402 U.S. 1, 24.

CONCLUSION

While this Court, by its very nature, is ill-equipped to specifically review the merits of every issue raised in the numerous desegregation cases presently in prosecution at all levels of the Federal Courts, it is clear from the case at bar, other cases presently pending here, and the recent decisions of this Court, that the Circuit Courts of Appeal are still very much in need of guidance by this Court in this difficult area of the law. It is no answer to the litigants that these cases are difficult of resolution. The delicate balancing of the collective interests involved intimately affects the lives of many thousands of children and their families. The Judgment of the Court of Appeals in this matter of August

23, 1976 presents issues of imperative public importance and at the same time conflicts with the principles set forth in the leading decisions of this Court.

We respectfully request that this Court issue a writ of certiorari to review that Judgment.

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November 21, 1976

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 1976, three copies of this Petition for Writ of Certiorari and accompanying separate Appendix were mailed, postage prepaid to: Mr. Thomas Hogan, 701 W. Walnut Street, Louisville, Kentucky, Counsel for Respondent; Mr. Henry A. Triplett, 231 S. 5th Street, Louisville, Kentucky; and Mr. J. Bruce Miller, 1112 Kentucky Home Life Bldg., Louisville, Kentucky, Counsel for Intervenor.

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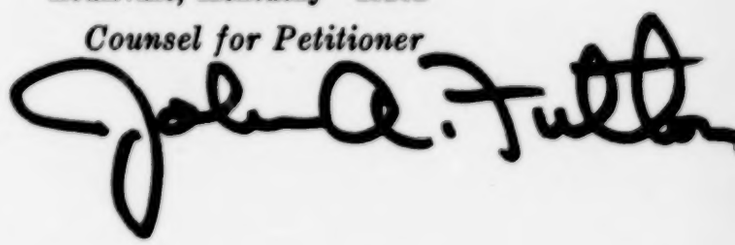

ADDENDUM

RACIAL RATIOS SET BY DESEGREGATION ORDER

Twelve Percent

Bruce Middle School*
Hazelwood Elementary*
Watterson Elementary*

Thirteen Percent

Meyzeek (7-9)
Myers Middle School*
Western Junior High (County)*

Fourteen Percent

Butler Junior High*
Central (10-12)

Fifteen Percent

Blake
Blue Lick
Cochrane
Conway (Grade 6)
Fairdale Elementary
Filson
Greenwood
Johnston*
Johnsontown
Kennedy, A.
Knight (Grade 6)
Laukhuf
Minors Lane
Sanders
Shawnee (10-12)
Wheeler
Wilkerson
Wilt

Sixteen Percent

Bowen
Carrithers (Grade 6)
Doss (9-12)

Sixteen Percent (Cont'd)

Fairdale (9-12)
Kammerer (Grade 6)
Lowe
Luhr
Okolona
Semple
Southern Junior High (City)*
St. Matthews
Trunnell
Waggener (9-12)
Wilder

Seventeen Percent

Atherton (10-12)
Auburndale
Ballard (9-12)
Bloom
Camp Taylor
Dixie
Eastern (9-12)
Field
Frost (Grade 6)
Gutermuth
Jacob
Jeffersontown Elementary
Jeffersontown (9-12)
Klondike
Lassiter (Grade 6)
Layne
Pleasure Ridge Park (9-12)
Schacklette
Shawnee (7-9)
Seneca (9-12)
Shyrock
Stewart
Valley Elementary
Valley (9-12)
Waller

Seventeen Percent (Cont'd)

Wellington
Westport (9-12)
Williams (Grade 6)

Eighteen Percent

Belknap
Cochran
DuValle (7-9)
Fern Creek (9-12)
Frayser
Gilmore Lane
Kenwood
Kerrick
Lowell
Medora
Moore (9-12)
Norton
Rangeland
Southern (9-12)
South Park
Stonestreet
Watson Lane

Nineteen Percent

Bates
Chenoweth
Conway (6-8)
Crums Lane
Doss (7-8)
Durrett (7-8)
Durrett (9-12)
Eisenhower
Fairdale (7-8)
Fern Creek Elementary
Franklin
Frost (6-8)

Nineteen Percent (Cont'd)

Goldsmith
Hite
Iroquois (7-9)
Knight (6-8)
Lassiter (6-8)
Pleasure Ridge Park (7-8)
Prestonia
Rutherford
Smyrna
Southern (7-8)
Stuart
Valley (7-8)
Williams (6-8)
Zachary Taylor

Twenty Percent

Byck
Crosby (Grade 6)
Crosby (6-8)
Hawthorne
Highland (7-9)
Lincoln
Middletown
Mill Creek*
Parkland (7-9)
Slaughter*
Stivers

Twenty-One Percent

Ballard (7-8)
Dunn
Eastern (7-8)
Greathouse
Kammerer (6-8)
Waggener (7-8)
Westport (7-8)

Twenty-Two Percent

Barret (7-9)
Butler High*
Fern Creek (7-8)
Indian Trail*
Roosevelt*

Twenty-Three Percent

Carrithers (6-8)
Iroquois High*
Jeffersontown (7-8)
Moore (7-8)

Twenty-Four Percent

Ahrens High*
Noe Junior High*

Twenty-Six Percent

Harstern
Perry
Western High
Wheatley

Twenty-Seven Percent

Atkinson*
Strother
Thomas Jefferson*
Western Junior High (City)*

Twenty-Eight Percent

Jones
McFerran
Price
Shelby Elementary*
Woerner Junior High

Twenty-Nine Percent

Carter
Coleridge-Taylor
Englehard Elementary*
Manual High*
Schaffner
Shawnee Elementary

Thirty Percent

Brandeis
Foster

Thirty-One Percent

King

Thirty-Two Percent

Breckenridge Elementary*
J. F. Kennedy
Parkland

Thirty-Three Percent

Bashford Manor*
Cane Run

Thirty-Four Percent

Portland Elementary*
Young

Thirty-Seven Percent

Newburg Middle School

The Court should note that Male High School from Cluster #2 in the Court's Plan (App. A) is omitted from the foregoing table. Counsel has been unable to determine at this time if the percentage listed in the plan is the result of a typographical error or a demographic error. One of the schools in this cluster has been subsequently exempted by the District Court from the desegregation plan, thus the percentages for all schools within that cluster, are in all probability, erroneous as of the date of the filing of this brief.